STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

HAROLD HUNTER, JR.,

Plaintiff-Appellant,

v

CITY OF FLINT,

Defendant-Appellee,

and

DAVID SISCO and AUTO CLUB INSURANCE ASSOCIATION,

Defendants. /

Supreme Court No. 147335

Court of Appeals No. 306018

Lower Court No. 10-094081-NI

HEATHER LYNN HANNAY,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant. /

Supreme Court No. 146763

Court of Appeals No. 307616

Court of Claims No. 09-116-MZ(A)

BRIEF *AMICUS CURIAE* OF THE MICHIGAN MUNICIPAL LEAGUE

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STATEMENT OF THE BASIS OF JURISDICTION

Amicus Curiae Michigan Municipal League adopts the City of Flint's Counter-Statement of the Basis of Jurisdiction of the Supreme Court in *Hunter v Sisco* (Docket No. 147335), as well as the Michigan Department of Transportation's Statement of Jurisdiction in *Hannay v Michigan Department of Transportation* (Docket No. 146763).

STATEMENT OF THE QUESTIONS INVOLVED

I.

In cases involving governmental defendants, is limiting recoverable damages to those involving "physical or corporeal injury to the body" and disallowing claims for emotional and work-loss damages consistent with a harmonious reading of the Governmental Tort Liability Act and the No-Fault Act?

Amicus Curiae Michigan Municipal League answers "Yes."

II.

Does permitting fact-finders to speculate that plaintiffs have incurred "work loss" damages - where they have not previously performed the work in question and are not even qualified to perform such work – result in windfalls to plaintiffs, raise litigation and insurance costs, and create unpredictable outcomes?

Amicus Curiae Michigan Municipal League answers "yes."

STATEMENT OF INTEREST

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of hundreds of Michigan cities and villages, the majority of which are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors[1], which is broadly representative of its members. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance.

Amici have a longstanding interest in the proper development of the law of governmental immunity, and their interest coincides with that of the public. This state's jurisprudence has long recognized that the issue of governmental liability is of "public interest." *Ross v Consumer Powers Co*, 420 Mich 567, 672, n 24; 363 NW2d 641 (1984). Past precedent has limited governmental actors' liability for damages under the motor

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[1] The 2013-14 Board of Directors of the Legal Defense Fund are: Lori Grigg Bluhm, Chair, City Attorney, Troy; Clyde J. Robinson , Vice Chair, City Attorney, Kalamazoo; Randall L. Brown, City Attorney, Portage; Thomas R. Schultz, City Attorney, Farmington and Novi; Catherine M. Mish, City Attorney, Grand Rapids; Eric D. Williams, City Attorney, Big Rapids; James O. Branson III, City Attorney, Midland; James J. Murray, City Attorney, Boyne City, Petoskey; Robert J. Jamo, City Attorney, Menominee; John C. Schrier, City Attorney, Muskegon; Jacqueline Noonan, President of Michigan Municipal League and Utica Mayor; Daniel P. Gilmartin, Executive Director and CEO of Michigan Municipal League; and William C. Mathewson, General Counsel, Michigan Municipal League, and Fund Administrator.

vehicle exception to immunity, MCL 691.1405, to "bodily injury" and "property damage," and has therefore disallowed claims for loss of consortium damages brought under this exception. *Wesche v Mecosta County Road Com'n*, 480 Mich 75; 746 NW2d 847 (2008). In this way, the judiciary properly adhered to the plain language of the motor vehicle exception and effectuated the Legislature's intent that governmental parties be protected with a broad sweep of immunity. *Nawrocki v Macomb County Road Com'n*, 463 Mich 143, 156; 615 NW2d 702 (2000). This, in turn, allows governmental parties to undertake their public duties free from intimidation and the distractions and expenses of defending tort lawsuits filed against them. *Rowland v Washtenaw County Road Com'n*, 477 Mich 197, 223 n 18; 731 NW2d 41 (2007); *Mack v City of Detroit*, 467 Mich 186, 203, n 18; 649 NW2d 47 (2002); *Grahovac v Munising Tp*, 263 Mich App 589, 595; 689 NW2d 498 (2004). That is in the interest of all. Amicus Curiae therefore requests that this Court hold that pain and suffering, emotional, and work loss damages are not recoverable as "bodily injury" damages under MCL 691.1405. Amicus Curiae further requests that in the event this Court permits recovery of such damages, at all, it ensure that damages awards are not based on speculation and conjecture. Failure to do so will have a devastating impact on governmental parties and open the floodgates of tort litigation to unfounded proportions which the Legislature expressly sought to restrict.

STATEMENT OF FACTS

Amicus Curiae relies upon the statements of facts set forth in the Michigan Department of Transportation's Brief on Appeal in *Hannay v Michigan Department of Transportation* (Docket No. 146763), as well as the City of Flint's Brief on Appeal in *Hunter v Sisco* (Docket No. 147335).

STANDARD OF REVIEW

A court reviews *de novo* questions of statutory interpretation. *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 488; 697 NW2d 871 (2005). The appeals here involve a question of statutory interpretation. *People v Kolanek*, 491 Mich 382, 393; 817 NW2d 528 (2012). As observed by the Court in *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), "[O]ur primary task in construing the statute, is to discern and give effect to the intent of the legislature. The words of the statute are the most reliable evidence of the legislature's intent and a court must give each word its plain and ordinary meaning". See also, *Krohn v Home-Owners Insurance Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). In interpreting a statute, a court considers both the plain meaning of the critical word or phrase as well as its place and purpose in the statutory scheme. *Sun Valley Foods Co v Ward*, 221 Mich App 335, 338; 561 NW2d 484 (1997), citing *Bailey v United States*, 516 US 137; 116 S Ct 501; 133 L Ed2d 472 (1995).

Finally, statutes should be harmonized or reconciled when possible. *Apsey v Memorial Hospital*, 477 Mich 120, 144; 730 NW2d 695 (2007).

SUMMARY OF THE ARGUMENT

Michigan's broad immunity was enacted to protect governmental parties from the distractions and expenses of defending tort lawsuits filed against them in the same way that the doctrine of sovereign immunity had historically protected the state. See generally *Ross v Consumers Power Co*, 420 Mich 567, 596; 363 NW2d 641 (1984). This Court emphasized that governmental immunity "protects the state not only from liability, but from the great public expense of having to contest a trial." *Odom v Wayne County*, 482 Mich 459, 478; 760 NW2d 217 (2008). The statute also is predicated on the theory that governmental parties engage in a great deal of risky conduct in the course of serving the public, often are seen as deep-pocket defendants, and lawsuits against them may serve to deter useful and socially desirable conduct because of the risk of suit. To guard against this, the Legislature enacted broad protections for governmental parties of all kinds. The Governmental Tort Liability Act, MCL 691.1401, *et seq.*, was intended to protect governmental parties against the burdens of discovery and trial, as well as against the potential for liability. (*Id.* at 479).

The Court of Appeals' published opinion in *Hannay v Department of Transportation*, 299 Mich App 261; 829 NW2d 883 (2013), interprets the phrase "bodily injury" found in the motor vehicle exception to governmental immunity, MCL 691.1405, too broadly. According to *Hannay*, work-loss damages are recoverable under the phrase "bodily injury" because, notwithstanding that they do not involve a "physical or

corporeal injury to the body", they are "items of damages that arise from the bodily injuries suffered by plaintiff" and are authorized under the No-Fault Act, MCL 500.3135(3). 299 Mich App at 269-270. The better authority, *Hunter v Sisco*, 30 Mich App 229; 832 NW2d 753 (2013), rejected a claim for pain and suffering and emotional damages on the basis that "[s]uch damages simply do not constitute physical injury to the body and do not fall within the motor vehicle exception." (*Id.* at 240-41).

Amicus Curiae submits that the term "bodily injury" has been properly defined as "a physical or corporeal injury to the body." *Wesche v Mecosta County Road Com'n*, 480 Mich 75, 85; 746 NW2d 847 (2008). Accordingly, this Court should adopt a bright-line rule that plaintiffs cannot recover for non-physical injuries, such as humiliation, mental anguish, emotional distress, work loss, and for that matter, any claimed damage or injury that lacks physical manifestation under the Governmental Tort Liability Act. The terms "bodily injury" and "property damage" were chosen specifically by the legislature when other, broader terms were not only available but rejected to expand the scope of the motor vehicle exception to governmental immunity, as evidenced by such use of broader terms throughout statutes governing governmental functions, immunities, liabilities, and general tort case cases (such as "personal injury" or "Injuries arising out of tort").

The provisions of the No-Fault Act, namely MCL 500.3135(3)(c) and MCL 500.3107(1), which allow for recovery of "work loss" damages in certain contexts, do not

alter this result. While plaintiffs argue that the later-enacted No-Fault Act repeals the Governmental Tort Liability Act, the two statutes can be harmonized under the general/specific canon of construction. *Reading Law: The Interpretation of Legal Texts*, Antonin Scalia and Bryan Garner, p 185 (2012). Under a harmonious reading of the statutes, the general No-Fault Act establishes recoverable damages in automobile accidents. However, in cases involving government entities and individuals, the Governmental Tort Liability Act specifies the available damages. Stated another way, the Legislature intended to create a statutory framework for liability governing all automobile accidents through the No-Fault Act, but also recognized that with respect to governmental agencies and actors, the categories of should be narrowed. Therefore, contrary to plaintiffs' assertion, the two available damages statutes can exist in harmony and support the rule advocated by Amicus Curiae.

In the event this Court determines that work-loss damages are recoverable against a governmental defendant under the No-Fault Act, Amicus Curiae submits that the Court should nonetheless reverse the lower courts' decisions in *Hannay v Department of Transportation* and hold that speculative damages proofs are insufficient to establish such damages under the applicable provisions of the No-Fault Act. Left uncorrected by this Court, the *Hannay* published opinion creates a dangerous precedent that it is entirely acceptable for a fact-finder (whether it be a jury or a bench trial) to predicate an award of work-loss benefits under MCL 500.3135(3)(c) and MCL

500.3107(1)(b) on speculation and conjecture. Not only does this run afoul of the purpose of economic damages, it creates unpredictable outcomes for defendants, raises litigation and insurance costs, and results in windfall damages awards to plaintiffs.

ARGUMENT I[2]

In Cases Involving Governmental Defendants, Limiting Recoverable Damages To Those Involving "Physical Or Corporeal Injury To The Body" And Disallowing Claims For Emotional And Work-Loss Damages Is Consistent With A Harmonious Reading Of The Governmental Tort Liability Act And The No-Fault Act.

After approximately a decade of debate about the nature and proper test for common law immunity and the passage of several statutes attempting to codify some form of immunity for public entities and those who act for them, the Legislature enacted the present statute, MCL 691.1401, *et seq*. The statute, known as the Governmental Tort Liability Act, was carefully designed to provide broad protection to public entities of all types, to abolish many of the old distinctions, and to replace them with a new statutory test that would be easier to apply and more predictable in outcome. And it made other changes, all intended to facilitate a broad protection for governmental entities and those acting on their behalf, while providing clear tests for the limited exceptions to immunity.

Under MCL 691.1407(1), a governmental agency is immune from suit for tort liability when engaged in the exercise or discharge of a governmental function. *Ross v Consumers Power Co (On Rhg)*, 420 Mich 567; 363 NW2d 641 (1984). Governmental officers and employees are afforded similar immunity from tort liability under MCL 691.1407(2). The broad immunity granted to governmental agencies and those acting on

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[2] This Argument addresses the issue posed by the Court in its orders granting leave to appeal in both *Hunter v Sisco* and *Hannay v Department of Transportation*.

their behalf under Michigan's governmental immunity statute is limited by narrowly drawn statutory exceptions. *Jackson v Detroit*, 449 Mich 420, 427; 537 NW2d 151 (1995). As this Court stated in *Nawrocki v Macomb Co Road Comm*, 463 Mich 143, 155-56; 615 NW2d 702 (2000):

> Governmental immunity is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a governmental agency...Immunity from tort lability, as provided by MCL 691.1407, is expressed in the broadest possible language – it extends immunity to all governmental agencies for all tort liability whenever they are engaged in the exercise or discharge of a governmental function.

Allowing plaintiffs to recover damages beyond those for "bodily injury" and "property damage" under MCL 691.1405, as the Court of Appeals did in *Hannay v Department of Transportation*, 299 Mich App 261; 829 NW2d 883 (2013), eviscerates the broad immunity enacted by the Legislature and upon which governmental parties justifiably rely upon in the course of their public duties. By concluding that emotional and work-loss damages are recoverable against governmental parties under the motor vehicle exception to governmental immunity, governmental parties will be subject to damages claims well beyond the legislature's express limitation of "bodily injury" and "property damage." In 2008, the Court examined the phrase "bodily injury" and narrowly defined it, consistent with its plain meaning. *Wesche v Mecosta County Road Com'n*, 480 Mich 75, 85; 746 NW2d 847 (2008). Adopting a contrary approach, as suggested by plaintiffs in both *Hannay* and *Hunter v Sisco*, would improperly broaden

the definition of "bodily injury" in a manner which will afford opportunistic plaintiffs opportunities to collect a windfall.

For these reasons, and for those more fully set forth below, Amicus Curiae respectfully requests this Court reverse the Court of Appeals' decision in *Hannay v Department of Transportation* and affirm the Court of Appeals' decision in *Hunter v Sisco*.

A. The Legislature created a complex scheme of immunity for governmental parties that must be interpreted based on the plain meaning of the language and the statute, read as a whole against the fabric of the law.

The exception at issue here is that for a governmental employee's negligent operation of a government-owned motor vehicle, MCL 691.1405. As that statute unequivocally provides, the exception is limited to recovery for "bodily injury" and "property damage." The plain language of MCL 691.1405 is properly read to provide that a plaintiff may avoid governmental immunity only if he sustains "bodily injury" and/or "property damage":

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.9 of the Compiled Laws of 1948.

Over the course of time, the appellate courts of this State have issued case law authority articulating the approach to be followed in construing statutes. In fact, much of the Court's jurisprudence in the area of statutory construction has evolved as part of addressing the statutes comprising Michigan's statutory governmental immunity

scheme, MCL 691.1401, *et seq.* The straightforward application of fundamental principles of statutory construction to the admittedly clear and unambiguous language of MCL 691.1405 leads to the proper result here: pain and suffering and work-loss damages are not recoverable against governmental parties.

Time and time again in applying statutes, courts have recognized and reiterated that statutory analysis begins with the wording of the statute itself, *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). Each word of a statute is presumed to be used for a purpose, and as far as possible, effect must be given to every word, clause, and sentence, *Robinson, supra,* citing *University of Michigan Bd of Regents v Auditor General*, 167 Mich 444, 450; 132 NW2d 1037 (1911). In *Robinson*, the court reiterated the principle that it could "not assume that the legislature inadvertently made use of one word or phrase instead of another", 462 Mich at 459, citing *Detroit v Redford Township*, 253 Mich 453, 456; 235 NW 217 (1931). It also emphasized that the clear language of a statute must be followed, *Lansing v Lansing Township*, 356 Mich 641, 649; 97 NW2d 804 (1959).

It is said that the words of a statute provide "the most reliable evidence of its intent...," *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 Law Ed 2d 246 (1981) and *Sun Valley Foods v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). It is only where a statute is ambiguous that a court properly looks outside the statute to ascertain the legislature's intent, *Turner v Auto Club Insurance Association*, 448 Mich 22, 27; 528

NW2d 681 (1985). The text of MCL 691.1405 governs the outcome here and proves the propriety of Amicus Curiae's position that the *Hannay* and *Hunter* plaintiffs are not entitled to the damages sought for work loss and pain and suffering, respectively.

This conclusion is the only one that furthers the legislative intent underlying the enactment of the Governmental Tort Liability Act. It alone gives meaning to the clear and plain language of § 1405 while satisfying fundamental rules of statutory construction. Short of explicit legislative authorization to do so, courts do not properly burden governmental agencies with additional liability. To do so would be contrary to sound judicial expressions recognizing the legislature's intention to confer immunity on governmental agencies for most of the activities in which they participate. As specifically observed by this Court in *Ross v Consumers Power Company (On Rehearing), supra,* at 596, the consensus which that court's efforts produced was not viewed as the Justices' individual respective determinations as to what would be most fair or just or the best public policy. Instead, the *Ross* decision was intended to reflect the legislature's intention concerning the nature and scope of governmental immunity. A like result must issue here.

B. The No-Fault Act's allowance of damages does not command a different result, where it can be harmonized with the Governmental Tort Liability Act to reach the same result.

Plaintiffs in *Hannay* contend that the motor vehicle exception "has no application to this case" given the No-Fault Act's authorization of damages for "allowable expenses,

work loss, and survivor's loss[.]" (Plaintiff-Appellee Hannay's Brief on Appeal, pp 32-33). The Court of Claims and the Court of Appeals agreed that Hannay could recover economic damages pursuant to MCL 500.3135(3)(c), a section of the No-Fault Act that specifically permitted an award of damages for allowable expenses for ordinary and necessary services, work loss, and survivor's loss. However, under a harmonious reading of the two statutes, the more specific statute – the Governmental Tort Liability Act – narrows the recoverable damages in automobile accidents involving governmental parties.

The No-Fault Act became effective October 1, 1973. *Royal Globe Ins Companies v Frankenmuth Mut Ins Co*, 419 Mich 565, 573, n 4; 357 NW2d 652 (1984). One section of the No-Fault Act maintained a possible source of recovery for economic damages to persons injured in motor vehicle accidents:

> (3) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 was in effect is abolished except as to:
>
> * * *
>
> (c) Damages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 in excess of the daily, monthly, and 3-year limitations contained in those sections. The party liable for damages is entitled to an exemption reducing his or her liability by the amount of taxes that would have been payable on account of income the injured person would have received if he or she had not been injured.

MCL 500.3135(3)(c).

Both the No-Fault Act and the Governmental Tort Liability Act speak to damages arising out of motor vehicle accidents. As such, they must be harmonized if possible. "Statutes that relate to the same subject matter or share a common purpose are *in pari materia* and must be read together as one law ... to effectuate the legislative purpose as found in harmonious statutes." *In re Project Cost & Special Assessment Roll for Chappel Dam*, 282 Mich App 142, 148; 762 NW2d 192 (2009). If two statutes lend themselves to a construction that avoids conflict, that construction should control. (*Id.*). But when they are *in pari materia* but conflict with one another on a particular issue, the more specific statute controls over the more general statute. *Donkers v Kovach*, 277 Mich App 366, 371; 745 NW2d 154 (2007).

Noted statutory interpretation scholars and jurists agree that words and phrases that come before the court for interpretation should be read harmoniously against the entire backdrop of the law. In *Reading Law: The Interpretation of Legal Texts*, Antonin Scalia and Bryan Garner explain this doctrine in a manner that makes clear that plaintiffs are wrong to say that the No-Fault Act controls simply because it was the later-enacted statute. They say:

> But it is a principle of statutory construction that a later-enacted statute that contradicts an earlier one effectively repeals it (see SECTION 55). So where there is a conflict between a general provision and a specific provision, whichever was enacted later might be thought to prevail. *But that analysis disregards the principle behind the general/specific canon – namely, that the two provisions are not in conflict, but can exist in harmony. The specific provision does not negate the general one entirely, but only its application to the situation*

> *that the specific provision covers. Hence the canon does apply to successive statutes.*

Reading Law: The Interpretation of Legal Texts, Antonin Scalia and Bryan Garner, p 185 (2012) (emphasis added). They elaborate on why the rule exists: "[T]hink of it this way: the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence." (*Id.*, p 183). As applied here, the Legislature intended to create a statutory framework for liability governing all automobile accidents through the No-Fault Act, but also recognized that in situations involving governmental agencies and actors, the categories of available damages should be narrowed. Whether you think of it as harmonizing the two provisions, or think of it as interpreting them so that the more general provision yields to the more specific, the outcome is the same and supports the ruling advocated by Amicus Curiae.

"To make laws agree or harmonize with laws is the best mode of interpreting them." *Halkerston's Latin Maxims* (70). As this Court recognized in *Nowell v Titan Ins Co*, 466 Mich 478, 483; 648 NW2d 157 (2002), "[i]n...a case of tension,...it is our duty to, if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them."). Giving meaning to both the Governmental Tort Liability Act and the No-Fault Act leads to the inescapable conclusion that the former governs the specific situation presented here – i.e., the categories of damages available against a governmental party involved in a motor vehicle accident.

ARGUMENT II[3]

Permitting Fact-Finders To Speculate That Plaintiffs Have Incurred "Work Loss" Damages - Where They Have Not Previously Performed The Work In Question And Are Not Even Qualified To Perform Such Work – Results In Windfalls To Plaintiffs, Raises Litigation And Insurance Costs, And Creates Unpredictable Outcomes.

Even assuming that damages beyond those for "bodily injury" and "property damage" are recoverable against a governmental defendant, the *Hannay* Court's allowance of recovery of "work loss" damages pursuant to MCL 500.3107(1)(b) based on rank speculation mandates this Court's reversal nonetheless. Despite the undisputed facts that Hannay was not a dental hygienist and had not even been accepted into a hygienist program, the court awarded work-loss damages based on Hannay's future employment as a licensed hygienist. *Hannay*, 299 Mich App at 271-73. This creates a dangerous precedent that plaintiffs may support their work-loss and other economic damages claims with little more than speculation and conjecture. Left to stand, this decision will provide windfalls to plaintiffs, raise the cost of litigation for

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[3] Amicus Curiae Michigan Municipal League submits that a proper resolution of Argument I moots the need to consider Argument II. However, in the event this Court concludes that pain and suffering/emotional and work-loss damages are recoverable against governmental parties as "bodily injury" damages, Amicus Curiae offers this Argument for the Court's consideration. Indeed, Argument II addresses the second question posed by this Court in its order granting leave to appeal in *Hannay v Department of Transportation* (Docket No. 146763) ("whether the evidence in this case establishes that the plaintiff incurred a loss of income from work that she would have performed as opposed to a loss of earning capacity.")

defendants, and result in unpredictable outcomes. To guard against these ills -- which will be felt not only by governmental defendants but by the defense bar as a whole - the Court must adopt a rule which eliminates speculation from the damages equation.

"Speculation is always a concern when a trier of fact is asked to determine damages." Kyle R. Crowe, *The Semantical Bifurcation of NonEconomic Loss: Should Hedonic Damage Be Recognized Independently of Pain and Suffering Damage?*, 75 Iowa L Rev 1275, (1990). Accordingly, the law in this State is clear that in the context of economic damages claims, remote, contingent, or speculative claims for damages cannot be maintained by plaintiffs. *Sutter v Biggs*, 377 Mich 80, 86; 139 NW2d 684 (1966); *Ensink v Mecosta Co General Hospital*, 262 Mich App 518, 524; 687 NW2d 143 (2004). Stated another way, a plaintiff asserting a cause of action has the burden of proving damages with reasonable certainty, and damages predicated on speculation and conjecture are not recoverable. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 96, 108; 535 NW2d 529 (1995); *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005). See also *Karbel v Comerica Bank*, 247 Mich App 90, 97-98; 635 NW2d 69 (2001), and *Skinner v Square D Co*, 445 Mich 153, 166; 516 NW2d 475 (1994) (noting that while circumstantial evidence giving rise to a reasonable inference may be sufficient to create an issue of material fact, a jury may not be permitted to guess.).

Despite judicial recognition that speculation should be eliminated from the damages equation, often in application it is not. As explained in one article from the Michigan Bar Journal:

> It is sometimes difficult to unpack a concept and truly understand how to apply it in the real world. Case in point: judicial pronouncements regarding the quantum of proof required to establish damages. It is generally accepted that a trier of fact may not base its findings on speculation and guesswork, and the courts invoke this very concept as applied to damages proofs. Yet in practice, juries are often permitted to hear highly speculative proofs, and parties are free to submit damages claims based on little more than the say-so of the party[...]

Daniel D. Quick, *Through a Glass, Darkly: Backs to Basics to Eliminate Speculative Damages Claims in Commercial Litigation*, 91 Feb MIBJ 31 (Feb 2012). *Hannay* is proof positive that speculation still permeates damages inquiries. Hannay conceded that she had not been admitted into any dental hygienist program, let alone completed it, and that she therefore had never performed any work as a hygienist. (Plaintiff-Appellee Hannay Brief, p 36). Instead, Hannay argued that there was sufficient evidence to show that she "would have" been accepted into a program, "would have completed it[,]" and "would have been hired as a dental hygienist" after finishing her training. (*Id.*). While Michigan courts have previously allowed plaintiffs to base wage-loss damages on more than what they were earning at the time of the accident (due to pending job offers and/or scheduled pay increases, for example), the sheer number of inferences the fact-finder in *Hannay* had to draw to award work-loss damages represents an impermissible

broadening of the scope of damages under §§ 3135 and 3107. Indeed, the plaintiff's proofs in *Hannay* were more akin to loss of earning capacity, which is not compensable under the No-Fault Act. *Ouellette v Kenealy*, 424 Mich 83, 85; 378 NW2d 470 (1985).

Absent this Court's correction, there will be a negative effect on public defendants like the cities and villages which comprise the Michigan Municipal League. Public entities, unable to increase prices or alter business practices to account for this increased risk of liability, very likely will be forced to cut funding or curtail important public programs. *Hamed v Wayne County*, 490 Mich 1, 29; 803 NW2d 237 (2011). This is in addition to the already-major cuts local communities throughout the State have had to make to law enforcement and other public programs as a result of cuts to state-funded local revenue sharing. Sam Inglot, *Revenue sharing cuts impact public safety*, The Michigan Messenger (June 10, 2011); Natalie Broda, *Flint financial woes continue*, themichigantimes.com (April 9, 2012); Ethan A. Huff, *Third-world America: Michigan city cuts power, removes street lights due to inability to pay electric bill*, naturalnews.com (November 9, 2011). Amicus Curiae submits that a governmental agency's financial resources are better spent on beneficial public programs and services like libraries, street lights, and public safety, rather than on providing payouts to plaintiffs for essentially loss of earning capacity under the guise of "work loss."

Moreover, opportunistic plaintiffs will undoubtedly use *Hannay* as a roadmap to obtain economic damages well beyond what they are rightfully entitled to. In *Hannay*,

the Court of Claims awarded the plaintiff work-loss damages based on an hourly rate of 280% of her current rate as a dental assistant. Left uncorrected by this Court, plaintiffs statewide may seek – and be awarded – similar windfall damages. This runs directly afoul of the goal of economic damages in the first place:

> Although the articulation of tort damage concepts varies somewhat from jurisdiction to jurisdiction, the rules for assessing and awarding economic damages in tort are based on the universal principle of putting the injured victim in a position as nearly equivalent to where he or she would have been but for the tortious injury.

Calculating Economic Damages, 1 Ann 2006 ATLA-CLE 997 (2006), citing Restatement (First) Torts § 901. In addition, the uncertainty created by the *Hannay* Court's decision will raise the costs of insurance, settlement, and litigation.

These negative effects are not limited to governmental defendants, although certainly the Court's decision will have a profound impact on Michigan's cities and villages. *All* defendants will face an increased risk of liability and large monetary judgments if this Court does not reverse *Hannay*. Indeed, because the No-Fault Act and its provision regarding work-loss damages applies generally in all automobile accidents unless a more specific statute (like the Governmental Tort Liability Act) restricts available damages, the defense bar as a whole will feel the impact of this Court's decision.

This Court has the opportunity to hold that a plaintiff is not entitled to "work loss" damages under MCL 500.3135(3)(c) where the only evidence offered to support this claim is speculative. As the Association of Trial Lawyers of America recognized:

> "There is inherent tension between the expectation damage principle, which affords recovery for future losses that are probable, and the uncertainty proviso, which instructs that damages are not recoverable beyond what the evidence shows with reasonable certainty. Courts are admonished to reject future loss awards that are based on speculation."

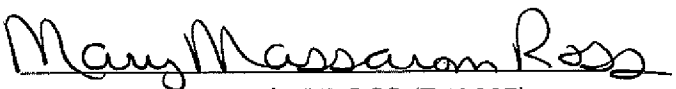
Ann 2006 ATLA-CLE 997. Reversing the Court of Appeals' and Court of Claims' decisions in *Hannay* will re-establish the general purpose of damages – to place the party in the same position she would have been in absent the accident – and clarify that plaintiffs must present more than purely speculative evidence to support their claims for "work loss." Reversing the lower courts' decisions in *Hannay* will have the additional benefit of ensuring that the provisions of the No-Fault Act are not used as a means to collect damages for loss of earning capacity under the guise of "work loss."

For all of these reasons, this Court's reversal in *Hannay v Department of Transportation* is proper.

RELIEF

WHEREFORE, *amicus curiae* Michigan Municipal League respectfully requests that this Court reverse the Court of Appeals' ruling in *Hannay v Department of Transportation* (Docket No. 146763), and affirm the Court of Appeals' ruling in *Hunter v Sisco* (Docket No. 147335). Amicus Curiae further requests this Court hold that wage loss and pain and suffering and/or emotional damages do not qualify as a "bodily injury" that permits a plaintiff to avoid the application of governmental immunity from tort liability under the motor vehicle exception to governmental immunity, MCL 691.1405. In the event this Court rules in Plaintiffs' favor on this first issue, Amicus Curiae requests that this Court adopt a rule that eliminates speculation from the determination of whether plaintiff incurred a loss of income or a loss of earning capacity.

PLUNKETT COONEY

By: 

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